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Through The Looking-Glass: Nuremberg's Confusing Legacy On Corporate Accountability Under International Law

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THROUGH THE LOOKING-GLASS: NUREMBERG'S CONFUSING LEGACY ON CORPORATE ACCOUNTABILITY UNDER INTERNATIONAL LAW

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I. INTRODUCTION

Corporate entities have never been subject to international criminal prosecution for violations of international human rights or humanitarian law.[1] As the judgment of the International Military Tribunal ("IMT") at Nuremberg explains, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[2] This traditional perspective on corporate accountability under international criminal law ("ICL") reflects the long-accepted principle of *societas delinquere non potest*—a legal entity cannot be blameworthy—and informs the jurisdiction of all subsequent international criminal tribunals.[3] For instance, the Rome Statute states that the International Criminal Court "shall have jurisdiction over natural persons pursuant to this Statute" thereby immunising all non-natural, legal persons, such as corporations, from prosecution.[4]

However, that is far from the complex story of corporate accountability under international criminal law, both past and present. A strong line of judicial precedents exist in which corporate executives, employees, and directors may be held personally and criminally liable for egregious abuses of human rights and humanitarian law, or complicity thereof.[5] Nevertheless, whether international law is directly applicable to corporations, and whether courts or tribunals can hold corporations criminally accountable for violations of international human rights and humanitarian law,

1. Régis Bismuth, *Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders*, 38 DENV. J. INT'L L. & POL'Y 203, 204 (2010).

2. *Nürnberg Trial*, 6 F.R.D. 69, 110 (IMT 1946).

3. ROLAND PORTMANN, LEGAL PERSONALITIES IN INTERNATIONAL LAW 19 (2010).

4. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 3854.

5. INTL. COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, FACING THE FACTS AND CHARTING A LEGAL PATH: REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 2-6 (2008), http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf.

remain in dispute amongst legal scholars.[6] Broadly speaking, there are two divergent and seemingly contradictory views; one view suggests courts and tribunals cannot hold corporations liable for international crimes, while the other view asserts they can.[7]

On this issue, as in so many others in international law, the considerable influence that Nuremberg continues to wield "cannot be overstated."[8] However, proponents of both views invoke the legal history of the Nuremberg-era, and, in particular, its treatment of major German corporations, to bolster their arguments.[9]

Since the "critical turning point"[10] of the IMT, convened in 1946 at Nuremberg, Germany, the development of ICL has continued to eschew the traditional focus of international law on State responsibility in lieu of the principle of individual criminal responsibility for egregious violations of international human rights and humanitarian law.[11] Still, seventy years after the fact, the Nuremberg-era's legacy towards holding corporations legally accountable for participation in grave violations of international law

6. *See* Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L L.J. 119, 129 (2010) (demonstrating that despite the precedent established by courts and tribunals holding corporations accountable for their egregious behaviour, decisions have found corporations to be outside the reach of customary international laws).

7. *See id.*

8. Robert Cryer, *International Criminal Justice in Historical Context: The Post-Second World War Trials and Modern International Criminal Justice*, *in* INTERNATIONAL CRIMINAL JUSTICE: LEGITIMACY AND COHERENCE 145, 146-47 (Gideon Boas et al. eds., 2012).

9. Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1104 (2009); *see also* Gwynne Skinner, *Nuremberg Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 343-44 (2008).

10. *See* ANTONIO CASSESE ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY 27 (2011) (conveying that the IMT's jurisdictional power is threefold and includes crimes against peace, war crimes, and humanity).

11. *See, e.g.*, S.C. Res. 1800, U.N. Doc. S/RES/1800 (Feb. 20, 2008); GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 509 (3d ed. 2014); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 584 (2d ed. 2010); STEVEN RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, 16-17 (3d ed. 2009).

remains at the centre of the contemporary debate, yet mired in confusion.[12]

After outlining the significance of this enquiry to the present-day in Part II, Part III of the article briefly recaps the history of major German corporate defendants at the Nuremberg trials, both the IMT, conducted by the four Allied Powers, and the "Subsequent Nuremberg Trials" conducted by U.S. authorities, established at Nuremberg in the post-World War II period. Part IV deploys two jurisprudential lenses, the judicial and the legal, to seek to understand how today's learned jurists and scholars of international law could have such diametrically opposed understandings of the same historical moment. With the intent of provoking further debate on Nuremberg's legacy in this regard, the article also elaborates upon a third socio-legal lens, which questions whether accountability for German corporations, or their leaders, was achieved at all. Part V reviews developments within ICL since Nuremberg to grapple with corporate criminality to identify whether one lens has gained the ascendancy. Ultimately, the article concludes that comprehending the Nuremberg-era's treatment of German corporations through the judicial-lens tends to dominate the positive law of ICL currently, denying corporate liability. However the discernible trend towards incorporating corporations into the international legal order is suggestive of the future prominence of the legal-lens, prompting formal recognition of direct liability of corporations for serious violations of international law.

II. CONTEMPORARY SIGNIFICANCE OF NUREMBERG

Clarifying Nuremberg's legacy in this regard is no mere historical exercise; its currency endures. Generally, Nuremberg's legacy It has significant implications for contemporary conceptions of transitional justice and the effectiveness of international governance, generally.. Whether this legacy affects The dispute as to Nuremberg;s legacy on the potential for tribunals to hold corporations responsible for commission or complicity in international crimes informs today's

12. Robert O. Keohane, Global Governance and Democratic Accountability (May 17, 2001) (unpublished manuscript) (on file with the London School of Economics).

judicial decisions on the topic and is at the centre of the general debate about whether international law can and should be applied to corporations.[13]

A. EFFECTIVENESS OF INTERNATIONAL LAW IS AT ISSUE

The issue of corporate accountability is bound with the broader challenge of maintaining the effectiveness of the international legal order, and, in particular, the protection of human rights in an increasingly globalized world. International law has failed to adapt from yesteryear's international community of sovereign States to the globalized, multi-layered networked society we experience today.[14] The shift in power from States to non-State actors, such as corporations, requires an integration of these non-State actors into the international legal order for it to remain relevant and fulfil its objectives.[15] Proponents of corporate accountability argue that the system must respond to the growing economic and political influence of the modern-day trans-national corporation.[16] Just as international

13. Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 227, 230-31 (Philip Alston ed., 2005); PORTMANN, *supra* note 3, at 19; A.A. Fatouros, *Introduction: Looking for an International Legal Framework for Transnational Corporations*, *in* 20 TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK 1, 2 (A.A. Fatouros & John H. Dunning eds., 1994); Math Noortmann & Cedric Ryngaert, *Introduction: Non-State Actors: International Law's Problematic Case*, *in* NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW 13 (Math Noortman & Cedric Ryngaert eds., 2010).

14. *See* Keohane, *supra* note 12, at 18 (arguing that significant accountability gaps prevent many organizations from being held accountable by international law).

15. Philip Alston, *The Myopia of Handmaidens: International Lawyers and Globalization*, 3 EUR. J. INT'L L. 435, 436-37 (1997); Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46 NETH. INT'L L. REV. 171, 186 (1999) [hereinafter Joseph, *Taming the Leviathans*]; Robert McCorquodale, *Non-State Actors and International Human Rights Law*, *in* RESEARCH HANDBOOK IN INTERNATIONAL HUMAN RIGHTS LAW 97, 114 (Sarah Joseph & Adam McBeth eds., 2010); Andrew Clapham, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. INT'L CRIM. JUST. 899, 926 (2008); Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibility of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 361 (2006).

16. Keohane, *supra* note 12, at 20-21.

law stands to constrain the raw power of States[17] (e.g., in the realm of human rights protections), similar constraints should exist on corporate power.

Corporations—especially large trans-nationals—enjoy many benefits arising out of the globalised, pluralistic legal environment in which they operate.[18] They possess some rights,[19] have sued sovereign States,[20] and already play a significant role in "developing, communicating and entrenching" international law norms.[21] A growing body of scholarship and international legal instruments suggest that alongside the rights and benefits that many transnational corporations ("TNCs") now enjoy under the international legal order are international legal duties to abide by core human rights and humanitarian law standards.[22]

17. Ved P. Nanda & David K. Pansius, *Sources of Customary International Law*, *in* 2 LITIGATION OF INTERNATIONAL DISPUTES § 9.2, at 1.

18. JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 77 (2006); SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 1-4 (2004) (emphasizing that TNCs profit by operating in areas of civil unrest, use their abundant power to influence governments to adopt policies that benefit their objectives, and employ local army divisions for both security and to act against their corporate competitors).

19. *See* John Gerard Ruggie, *Taking Embedded Liberalism Global*, *in* TAMING GLOBALIZATION 93, 106 (David Held & Mathias Koenig-Archibugi eds., 2003); Peter Muchlinski, *Multinational Enterprises as Actors in International Law: Creating "Soft Law" Obligations and "Hard Law" Rights*, *in* NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW 19, 30-31 (Math Noortman & Cedric Ryngaert eds., 2010) (conveying that non-state actors benefit from recognition under international treaties and have enforceable rights under international law).

20. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 43 (Cambridge University Press, 3rd ed. 2010) (referencing Shot v. Iran, U.S. CTR 230, 218 (1990), where a tribunal declined to protect a corporation that violated the internal laws of its host state through illegally purchasing shares); Muchlinski, *supra* note 19, at 32 (describing a claim ultimately withdrawn against the Republic of South Africa brought by Italian mining investors who argued their investment was expropriated as a result of South Africa's post-apartheid equal opportunity and land rights policy); Bismuth, *supra* note 1, at 217 (indicating that Bosphorus instituted proceedings in Ireland against Bosnia-Herzegovina).

21. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 212 (1998); *see also* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001) (arguing that the extensive power corporations exert over individuals and governments influences international affairs).

22. Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J. 411, 415 (2005); JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS,

Scholars have also argued that the integrity of ICL demands recognition of corporate liability for gross human rights violations. Whilst individual responsibility may well be a "cornerstone" of international criminal law, upon closer inspection, this body of law deals with crimes that require a plurality of actors for their commission.[23] Genocide, war-crimes, and crimes against humanity all contemplate collective action.[24] Koskenniemi observes that "sometimes a tragedy may be so great, a series of events of such political or even metaphysical significance, that punishing an individual does not come close to measuring up to it."[25] Nollkaemper and Van Der Wilt contend that individual responsibility for international crimes "is only a partial solution, and one which does not always take away the need to address the larger entities of which individuals are a part."[26] Recognition of corporate criminality would go some way to alleviate the shortcomings of ICL these scholars have identified.

B. IMPACT ON TRANSITIONAL JUSTICE

The past few decades have seen an increase in the practice of "transitional justice litigation." Practically, victims of corporate human rights abuses—many recovering from or still enduring armed

PROCESS 215 (3d ed. 2010); Muchlinski, *supra* note 19, at 24-25; STEPHEN TULLY, CORPORATIONS AND INTERNATIONAL LAW MAKING 107 (2007).

23. WERLE & JESSBERGER, *supra* note 11, at 36; Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 189-191 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (arguing that appropriate implementation of the statute requires that it extend to all actors who contribute to violations of international humanitarian law regardless of whether such involvement is direct or indirect).

24. Gerry Simpson, *Men and Abstract Entities*, *in* SYSTEM CRIMINALITY IN INTERNATIONAL LAW 69, 76-77 (Harmen Van Der Wilt & André Nollkaemper eds., 2009).

25. Martti Koskenniemi, *Between Impunity and Show Trials*, *in* 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 2 (2002); *see also* 2 INT'L. COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, CRIMINAL LAW AND INTERNATIONAL CRIMES: REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 1, 56 (2008), http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf [hereinafter CRIMINAL LAW AND INTERNATIONAL CRIMES].

26. André Nollkaemper, *Introduction*, *in* SYSTEM CRIMINALITY IN INTERNATIONAL LAW 1, 4 (Harmen Van Der Wilt & André Nollkaemper eds., 2009).

conflict—have increasingly pursued civil lawsuits against their alleged abusers in domestic courts around the globe, alleging violations of core international legal standards.[27] For example, privately-launched lawsuits (brought in various countries) have targeted transnational corporations, such as Caterpillar, Veolia, and Alstom, alleging violations of international human rights law due to their continued operations with Israeli partners in the Occupied Palestinian Territories.[28]

However, the relevance of corporate liability for international crimes to contemporary transitional justice efforts is most prominently evinced in the spate of Alien Tort Statute ("ATS") cases launched against transnational corporate defendants, which have wound their way into the U.S. court system. [29] These multi-million dollar lawsuits assert the violation of the law of nations and revolve around allegations of corporate commission and/or complicity in war crimes and serious human rights violations committed in developing countries.[30] Since the mid-1990s, victims have filed scores of ATS suits against U.S. and non-U.S.-based transnational corporations alleging gross human rights abuses in dozens of countries; courts have deployed the ATS as an innovative transitional justice mechanism.[31] ATS lawsuits offer abuse victims their day in court, a

27. *See* RUTI G. TEITEL, GLOBALIZING TRANSITIONAL JUSTICE 7 (2014); Jonathan Kolieb, Case Note, *Kiobel v. Royal Dutch Shell: A Challenge For Transnational Justice*, 16 MACQUARIE L.J. 169, 170 (2014) (discussing the effective use of the Alien Tort Statute as an instrument of transitional justice).

28. Corrie v. Caterpillar Inc., 403 F. Supp. 2d 1019, 1023-28 (W.D. Wash. 2005); Cour d'appel [CA] [regional court of appeal] Versailles, May 30, 2011, No 11/05331, (Fr.).

29. Alien Tort Claims Act 28 U.S.C.S. § 1350 (2015).

30. *Id.*

31. *See* Jeremy Sarkin & Carly F. Westerman, *Reparation for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims Act Genocide Case of the Herero of Namibia*, 9 HUM. RTS. REV. 331, 356-58 (2008) (noting the unprecedented level of attention given to providing reparations for past human rights violations); Jérémie Gilbert, *Corporate Accountability and Indigenous Peoples: Prospects and Limitations of the U.S. Alien Tort Claims Act*, 19 INT'L J. MINORITY & GRP. RTS. 25, 27 (2012) (underscoring the global impact the ATCA provides when applied to prosecute corporations responsible for human rights violations); Eric A. Posner, *The Alien Tort Claims Act Under Attack*, 98 AM. SOC'Y INT'L L. PROC. 56-57 (2004); Kolieb, *supra* note 27, at 169-170 (explaining that the ATS became one of the most powerful tools for victims to pursue justice).

judicial adjudication of the conduct in dispute, and potential reparations to victims for harm caused – key objectives of transitional justice.[32] Indeed, the ATS became the premier legal pathway for victims from around the world to seek accountability for corporate human rights abuses.[33] For instance, ATS cases have included claims relating to corporate human rights violations in conflict-affected countries such as Colombia, Sudan, Cote d'Ivoire, Indonesia, and Myanmar.[34]

C. CORPORATE ACCOUNTABILITY UNDER THE ALIEN TORT STATUTE

The divergence in understanding corporate accountability for international crimes has played out most prominently in ATS cases. Incredibly, the legacy of Nuremberg is frequently invoked in ATS cases in the United States to justify *and* deny corporate liability for international human rights abuses.[35]

32. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transnational Justice*, 15 HARV. HUM. RTS. J. 39, 95 (2002); David P. Forsythe, *Human Rights and Mass Atrocities: Revisiting Transitional Justice*, 13 INT'L STUD. REV. 85, 90 (2011); *What is Transitional Justice?: A Backgrounder* (Feb. 20, 2008), http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf; Helen Chang Mack & Mónica Segura Leonardo, *Editorial Note: When Transitional Justice Is Not Enough*, 6 INT'L J. TRANSITIONAL JUST. 2, 5 (2012); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91 (1998); Eric A. Posner & Adrian Vermeule, *Transitional Justice As Ordinary Justice*, 117 HARV. L. REV. 762, 766 (2003).

33. Kadic v. Karadzić, 70 F.3d 232, 236 (2d Cir. 1995) (holding subject-matter jurisdiction exists to determine whether the tribunal can hold the leader of the self-proclaimed Bosnian-Serb republic liable for genocide, war crimes, and crimes against humanity that were carried out while he served as a state actor).

34. *Alien Tort Statute*, U.S.A. ENGAGE, http://www. http://usaengage.org/Issues/Litigation/Alien-Tort-Statute-/ (last visited Oct. 13, 2015).

35. *See* Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1201-02 (9th Cir. 2007) (holding that the lower court should have found subject matter jurisdiction for the plaintiffs' claims against this international mining corporation accused of committing environmental devastation, war crimes, racial discrimination, and crimes against humanity); Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002) (declining to apply the Nuremberg reasoning and holding that the plaintiffs sufficiently alleged violations of the law of nations pursuant to ATS); Kiobel v. Royal Dutch Petrol. Corp., 621 F.3d 111, 120 (2d Cir. 2010) (declining to find corporate liability); South African Apartheid Litigation v. Citigroup, Inc., 346 F.

In 2010, for example, the Second Circuit Court of Appeals unanimously dismissed the plaintiffs' claims in *Kiobel v. Royal Dutch Petroleum* (Shell).[36] However, the justices fiercely disagreed as to the reasoning for dismissing the claims against the oil-and-gas giant, finding that the company was complicit in severe human rights abuses in the Niger Delta, including the extrajudicial trial[37] and the torture and execution of local community leaders.[38]

Writing the majority opinion, Justice Carbanes held that since corporations cannot be liable for international crimes under international law, they could not be held accountable under the ATS cause of action.[39] In a separate opinion, the third judge, Justice Leval, attacked the judicial logic of the majority decision.[40] He suggested that the majority's argument was "illogical, misguided, and based on misunderstandings of precedent."[41] Curiously, both judicial opinions based their reasoning on interpretations of Nuremberg-era jurisprudence.

The U.S. Supreme Court accepted certiorari for *Kiobel* specifically to address culpability.[42] Many international legal scholars, as well as U.S. judges, were eager to have the highest U.S. court issue a final determination on the matter. The *Kiobel* case was one of the most anticipated cases on a crowded 2013 Supreme Court docket. Its practical consequences would impact billions of dollars pertaining to present and future ATS claims; human rights victims and

Supp. 2d 538, 549-50 (S.D.N.Y. 2004) (finding the defendant did not engage in state action under the ATS); Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 334 (S.D.N.Y. 2005) (justifying corporate liability by holding adequate evidence existed to support allegations that defendant was responsible for serious human rights abuses).

36. *Kiobel*, 621 F.3d at 150; *Kiobel Case: U.S. Supreme Court Review of Alien Tort Claim*, BUS. & HUM. RTS. RESOURCE CTR., http://business-humanrights.org/en/corporate-legal-accountability/special-issues/kiobel-case-us-supreme-court-review-of-alien-tort-claims-act (last visited Oct. 13, 2015).

37. *Kiobel*, 621 F.3d at 115-196.

38. *Id.*; Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y TIMES, June 8, 2009, http://www.nytimes.com/2009/06/09/business/global/09shell.html.

39. *Kiobel*, 621 F.3d at 120.

40. *Id.* at 149-96.

41. *Id.* at 151.

42. *Kiobel v. Royal Dutch Petroleum*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/ (last visited Oct. 13, 2015).

corporations alike would feel its impact. Its jurisprudential implications would have been no less noteworthy because the highest U.S. court—a court held in high regard internationally—[43] would weigh in on a particularly vexing area of international law to decide whether corporations could be held liable for international crimes. However, the U.S. Supreme Court ultimately left the issue unaddressed.[44] Instead, the Justices opted to decide the case on other jurisdictional grounds, leaving the international community in the dark as to whether corporations were liable for "violations of the law of nations."[45]

In the absence of a U.S. Supreme Court determination, this article returns to an examination of Nuremberg-era jurisprudence in an effort to gain clarity on the matter of corporate liability for international crimes. This article seeks, in part, to explain the paradoxical judgments issued by the Second Circuit Court of Appeals, and it questions how is it possible that seventy years after this epoch-changing moment in international law, the Nuremberg legacy regarding corporate liability is so disputed and confused to the extent that eminent justices, legal scholars, and practitioners have such differing views as to what it stands for.

The Second Circuit's *Kiobel* judgment reflects what this article terms as the judicial and the legal lenses through which one can view Nuremberg's treatment of German corporations. Both are focussed on the law, and vary only in aperture and what is meant when referring to Nuremberg-era jurisprudence. That is, does one look exclusively at the judicial verdicts issued in the courtrooms of Nuremberg, or is a more expansive view of the justice meted out to German corporate giants in the post-War period appropriate?[46]

43. *Court Role and Structure*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Oct. 13, 2015).

44. *See* John Bellinger, *Stop Press: Supreme Court Orders Kiobel Reargued to Address Extraterritoriality*, LAWFARE (Mar. 5, 2012, 7:03 PM), https://www.lawfareblog.com/stop-press-supreme-court-orders-kiobel-reargued-address-extraterritoriality (highlighting that questions posed by Justices Kennedy, Roberts, and Alito at oral arguments focused on jurisdiction, rather than on corporate liability).

45. Ralph Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT'L L. 841, 844 (2013).

46. Quincy Wright, *Nuremberg: German Views of the War Trials*, 69 HARV. L. REV. 964, 965 (1956).

Seemingly, whether one views Nuremberg as standing for or against corporate accountability for international human rights and humanitarian law violations rests largely on which historical lens is employed to view the law's role during the Nuremberg-era.

III. CORPORATE DEFENDANTS AT NUREMBERG: A BRIEF HISTORY

From the outset, there was strong determination among the Allied Powers[47] to prosecute German industrialists alongside the Third Reich's military and political leaders at Nuremberg.[48] The Allied Powers intended to include representatives of German industries in the exemplary justice meted out by the IMT.[49] Included on the original list of the defendants in the first (and only) trial before the IMT was Gustav Krupp, who ran the Krupp AG, a heavy industry conglomerate of companies from 1909 until 1941.[50] Krupp was instrumental in the rearmament of Germany in the inter-war years and the creation of the Nazi war-machine.[51]

Due to ill-health (senility, partial paralysis, and old age), the Tribunal granted Krupp permission to forego trial, believing he was mentally and physically incapable of defending himself.[52] Prosecutors had hoped to replace Gustav Krupp on the docket with his son, Alfred Krupp who had taken over the running of the Krupp industrial conglomerate from his father in 1941.[53] However, the

47. *Id.* at 967.

48. *Id.* at 964.

49. THE KRUPP CASE (1948), *reprinted in* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1 (1950) [hereinafter KRUPP CASE].

50. C.N. Trueman, *Gustav Krupp*, THE HISTORY LEARNING SITE, historylearningsite.co.uk (last visited Oct. 26, 2015); C. Peter Chen, *Gustav Krupp*, WORLD WAR II DATABASE, http://ww2db.com/person_bio.php?person_id=318 (last visited Oct. 26, 2015).

51. *See, e.g.*, *International Military Tribunal: The Defendants*, U.S. HOLOCAUST MEMORIAL MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007070 (last visited Oct. 13, 2015) (noting the use of forced labor contributed to the success of Krupp's firm during the war).

52. *Id.*; *International Military Tribunal for Germany, Order of the Tribunal Granting Postponement of Proceedings Against Gustav Krupp Von Bohlen*, AVALON PROJECT, http://avalon.law.yale.edu/imt/v1-15.asp (last visited Oct. 17, 2015) [hereinafter *Order Granting Postponement*].

53. *International Military Tribunal for Germany, Supplemental Memorandum*

judges of the IMT refused to allow the proposed substitution, and, so, the now-famous IMT Trial of Nazi War Criminals proceeded without a German industry representative amongst the defendants.[54]

The Allies' original plan for Nuremberg called for a second trial within the IMT,[55] and the Allie' intended to have a substantial number of defendants from German industry.[56] Yet due to the nascent Cold War, this never happened.[57] In particular, the Western powers feared the propaganda coup a second trial featuring German industries might provide to the Soviet Union.[58] As Chief U.S. Prosecutor, Jackson wrote in a diplomatic memo directed to U.S. President Truman in 1946:

> I also have some misgivings as to whether a long public attack concentrated on private industry would not tend to discourage industrial cooperation with our Government in maintaining its defences in the future while not at all weakening in the Soviet position, since they do not rely upon private enterprise.[59]

The IMT ended without prosecuting a single German industrialist.[60] That task passed to the subsequent trials each of the Allies held in their respective zones of Occupied Germany.[61] The United States was the most vigorous of the Great Powers and was intent on prosecuting and punishing the Nazi leadership through judicial trials.[62] The United States intended to hold dozens of follow-

of the French Prosecution, AVALON PROJECT, http://avalon.law.yale.edu/imt/v1-14.asp (last visited Oct. 24, 2015).

54. *Order Granting Postponement*, *supra* note 52.

55. *International Military Tribunal for Germany, Preliminary Hearing, Wednesday, 14 November, 1945: Morning Session*, AVALON PROJECT, http://avalon.law.yale.edu/imt/11-14-45.asp (last visited Oct. 17, 2015); KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 17 (2011).

56. *See* HELLER, *supra* note 55, at 21 (explaining that proposed defendants included those who had raised money for the Nazis and played significant roles in Germany's rearmament).

57. *Id.* at 24.

58. *Id.* at 21.

59. *Id.*

60. *Id.* at 24.

61. *Id.*

62. HELLER, *supra* note 55, at 1-2, 9-25 (explaining that the subsequent tribunals convicted 142 out of 147 defendants which represented "all important segments of the Third Reich").

up trials.[63] Ultimately, this ambitious plan was reduced to twelve trials that have become known as the "Subsequent Nuremberg Trials."[64] These trials were held at the Palace of Justice in Nuremburg, the venue of the IMT, yet convened exclusively by the United States.[65] The panels of judges, lawyers, and trial staff were drawn from the U.S. legal system.[66]

A. THE "INDUSTRIALIST TRIALS"

Despite reticence and outright protest from some within the Chief of Counsel for War Crimes Office and within U.S. political circles against targeting German industrialists,[67] three out of the twelve subsequent trials targeted German industrialists.[68] Some of the bastions of German industry,[69] and scores of German corporate executives and directors who were intimately involved in aiding and abetting the Nazi war machine[70] were put on the docket.[71] Additional planned prosecutions targeted large German banks and insurance companies that served to underwrite the war, but those never took place.[72]

The *Flick*, *Krupp*, and *Farben* trials, named after the conglomerates from which the defendants were employees and/or executives, collectively became known as the "Industrialist Trials."[73]

63. HELLER, *supra* note 55, at 12.

64. HELLER, *supra* note 55, at 1; Grietje Baars, *Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII*, *in* THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 163 (Kevin Jon Heller & Gerry Simpson eds., 2013).

65. HELLER, *supra* note 55, at 163,168; KRUPP CASE, *supra* note 49, at 2.

66. HELLER, *supra* note 55, at 1.

67. TOM BOWER, BLIND EYE TO MURDER: BRITAIN, AMERICA AND THE PURGING OF NAZI GERMANY - A PLEDGE BETRAYED 278 (1981).

68. THE FLICK CASE (1948), *reprinted in* WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS, 3 (1952) [hereinafter FLICK CASE]; THE I.G. FARBEN CASE (1948), *reprinted in* 7 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1 (1953) [hereinafter I.G. FARBEN CASE]; *see also* KRUPP CASE, *supra* note 49, at 1.

69. S. Jonathan Wiesen, *German Industry and the Third Reich: Fifty Years of Forgetting and Remembering*, ANTI-DEFAMATION LEAGUE'S BRAUN HOLOCAUST INSTITUTE, http://archive.adl.org/braun/dim_13_2_forgetting.html#.Vi5Kl7Rtv8E).

70. I.G. FARBEN CASE, *supra* note 68, at 1-2.

71. *Id*.

72. BOWER, *supra* note 67, at 18-21.

73. FLICK CASE, *supra* note 68, at 3; I.G. FARBEN CASE, *supra* note 68, at 1;

These trials represented the first time in modern history where a judicial body considered the cases of corporations and their agents committing war crimes and other violations of international law.

Flick, *Krupp*, and *Farben* were targeted due to the Allies' perception that each played a critical role in the German arms and related industries that were crucial to the Nazi arms build up and execution of their war plans.[74] Both cases dealt with heavy industries. The *Flick Concern* included coal mines and steel plants, while the *Krupp Group* included steel and armaments factories.[75] *I.G. Farben* was, at the time, the world's largest business conglomerate that had a diverse range of commercial interests, and most prominent was the dominant chemical company of its day.[76] Of its exploits, Farben was most infamous for its development of synthetic nitrate, which allowed the German military to become independent of foreign sources. Farben was also infamous for its invention and manufacture of Zyklon B, the poison gas used in the Auschwitz gas-chambers.[77] Indeed, Farben epitomized the intimate role German industry held in the Nazi rise to power and its murderous war effort. For example, the series of camps constructed at Auschwitz did not only include Auschwitz I and II-Birkenau (the concentration and extermination camps),[78] but Auschwitz III-Buna—a massive complex of Farben factories that dwarfed the other two camps in size, and where the camps' inmates were forced to work.[79] Not only did Farben benefit from the huge slave labor pool of the camps, but Farben scientists regularly used camp inmates in a series of macabre medical and chemical experiments.[80]

In total, forty-two industrialists were tried at Nuremburg by U.S. authorities. The tribunal found twenty-seven of them guilty of various international crimes, including war-crimes and crimes

KRUPP CASE, *supra* note 49, at 1.

74. FLICK CASE, *supra* note 68, at 3; I.G. FARBEN CASE, *supra* note 68, at 1-2; KRUPP CASE, *supra* note 49, at 1-2.

75. I.G. FARBEN CASE, *supra* note 68, at 16; KRUPP CASE, *supra* note 49, at 1481.

76. I.G. FARBEN CASE, *supra* note 68, at 16.

77. 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93-94 (U.N. War Crimes Comm'n, ed., 1947).

78. JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 121 (1978).

79. *Id.* at 120-21.

80. *Id.* at 120-22.

against humanity, crimes which also included the use of slave-labor and the plundering and spoliation of occupied territories. [81] They were sentenced to prison terms ranging from one-and-a-half to twelve years in length.[82] The tribunal sentenced Alfred Krupp, the owner and CEO of the Krupp Group, and the man considered most culpable[83] to twelve years imprisonment and ordered to forfeit all of his real and personal property.[84] These trials demonstrate that there is no impediment to direct application of ICL to corporate managers, directors, and executives.[85]

IV. DIFFERENT LENSES TO EXPLAIN THE PRESENT-DAY DIVERGENCE

These facts about the "Industrialist Cases" are well documented.[86] Nevertheless, successive generations of international law scholars, practitioners, and contemporary judges and tribunals keenly debate how the judgments in these cases and related decrees of the Allied Powers during the Nuremberg-era ought to be interpreted vis-a-vis corporate accountability for major human rights abuses.[87]

This article suggests that there are two different lenses—the judicial and the legal—through which one can view the Nuremberg-era's treatment of German corporations. These labels are deliberately chosen, terms that are sometimes used interchangeably to indicate that whilst their jurisprudential views are different, it is a difference borne out of nothing more than aperture and focus.

These interpretive lenses help explain the vigorous contemporary disagreements as to corporate liability under international law, such as that which appears in the *Kiobel* judgments.[88] Whether contemporary scholars and jurists consider if Nuremberg stands for

81. FLICK CASE, *supra* note 68, at 3; KRUPP CASE, *supra* note 49, at 1-2.

82. FLICK CASE, *supra* note 68, at 1228; KRUPP CASE, *supra* note 49, at 1486; I.G. FARBEN CASE, *supra* note 68, at 1; HELLER, *supra* note 55, at 93-94.

83. KRUPP CASE, *supra* note 49, at 1486.

84. KRUPP CASE, *supra* note 49, at 1486*;* HELLER, *supra* note 55, at 101.

85. Olga Martin-Ortega, *Business Under Fire: Transnational Corporations and Human Rights In Conflict Zones*, *in* INTERNATIONAL LAW AND ARMED CONFLICT 189, 201 (Noëlle Quénivet & Shilan Shah-Davis eds., 2010).

86. *Id.*

87. *Id.*

88. Kiobel v. Royal Dutch Petrol. Corp., 621 F.3d 111, 119 (2d Cir. 2010).

or against corporate liability seems largely to depend on how wide or narrow a jurisprudential lens through which the Nuremberg-era is historicized.

A. THE NARROW JUDICIAL LENS

If viewing the Nuremberg-era through a narrow, positivist lens, focussing on the judicial verdicts of Nuremberg from the IMT and subsequent trials, one could reasonably conclude that corporations cannot be liable, as a rule for international crimes.[89] Adherents of this view invariably commence their argument point to one of the most frequently cited passages in the IMT judgment, which seemingly supports this understanding of Nuremberg's jurisprudence and states: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[90]

This famous sentence drawn from the IMT judgment suggests that the law, as enforced at Nuremberg, focused exclusively on individual liability, rather than imputing any responsibility to corporations (or other collective organizations).[91] As one U.S. jurist noted, this statement means that "liability under the law of nations . . . could not be divorced from individual moral responsibility."[92] Indeed, individual responsibility is a core principle of international criminal law, as it has developed in the decades since Nuremberg.[93]

Employing this narrow, judicial lens, the fact that no corporation was put on the docket for crimes and no corporation was punished by the judicial decisions of the Nuremberg trials is determinative.[94] Moreover, adherents of this view also point out that no German company was declared a "criminal organisation" by the IMT, despite

89. *Id.* at 147 (holding "corporate liability is not a norm that we can recognize and apply in actions under the ATS because the customary international law of human rights does not impose any form of liability on corporations (civil, criminal, or otherwise)").

90. *Nürnberg Trial*, 6 F.R.D. 69, 110 (IMT 1946).

91. *Kiobel*, 621 F.3d at 145-48.

92. *Id.* at 135.

93. WERLE & JESSBERGER, *supra* note 11, at 509 (asserting that the collective nature of violations of international law does not abate the need to assign individual responsibility to all contributors); CASSESE ET AL., *supra* note 10, at 15 (noting that punishing violators is key to criminal international law).

94. CASSESE ET AL., *supra* note 10, at 15.

its clear authority to do so under article 9 of the London Charter.[95] The executives of the major German industrial giants were prosecuted and found guilty of war crimes and imprisoned, but the corporations themselves escaped judicial accountability.[96] Scholars denying the applicability of international criminal law to corporations suggest this indicates that Nuremberg stands for individual culpability, not corporate or State culpability.[97]

This is a straightforward, formalistic reading of Nuremberg's legacy. Put simply, the fact that no corporations were in the docket is evidence that ICL is not applicable to collective entities, such as corporations.[98] This reading confirms that ICL is concerned with individual criminal responsibility exclusively.

Whilst articles 9 and 10 of the London Charter include the concept of "criminal organisations"—and some organizations were found to be criminal (e.g. the Leadership Corps of the Nazi Party, Gestapo, SD, SS[99])—Spiropoulos explains there was "no penal sanction to the declaration of [organisational] criminality . . . [n]o responsibility of the organization was established."[100] Spiropoulos also adds that "municipal laws, with rare exceptions, do not establish the penal responsibility of legal persons."[101] The International Law Commission, in its commentary on the *Draft Code of Crimes Against the Peace and Security of Mankind* held that individual responsibility

95. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL (1945), *reprinted in* 1 INTERNATIONAL MILITARY TRIBUNAL 10, 12 (1947) (Article 9 states "[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the Individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.").

96. *See, e.g.*, BORKIN, *supra* note 78, at 158 (observing that after Eisenhower's recommendations about I.G. Farben were made public, the shares of I.G. Farben doubled on the Munich stock exchange).

97. Brief for Royal Dutch Petroleum Co.-Ilya Shapiro et al. as Amici Curiae Supporting Respondents, at 26, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013) (No. 10-1491) (arguing that the "Nuremberg Charter did not provide for jurisdiction to hear claims against corporations").

98. *Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur*, [1950] 2 Y.B. Int'l L. Comm'n 253, U.N. Doc. A/CN.4/25/1950 [hereinafter *Spiropoulos Report*].

99. RATNER, *supra* note 11, at 16, 17.

100. *Spiropoulos Report*, *supra* note 98, at 260.

101. *Id.* at 261.

is the "cornerstone" of international criminal law.[102] This approach was affirmed by the International Criminal Tribunal for Yugoslavia ("ICTY") in its 1997 *Tadic*[103] decision, where the tribunal stated that "no one may be held answerable for acts or omissions of organizations to which he belongs, unless he bears personal responsibility for a particular act, conduct or omission."[104]

B. THE BROADER LEGAL LENS

However, this narrow reading of Nuremberg's treatment of German corporations which actively participated in the Nazi war-effort does not go unchallenged.[105] In fact, if the jurisprudential gaze with which one views Nuremberg is broadened one could reasonably conclude that the criminality of German corporations *was* recognised and they *were* punished for their crimes. Taking this approach, one concludes that Nuremberg "recognized that corporations had obligations under international law (and were therefore subjects of international law)" and acknowledges the applicability of international criminal law to corporations.[106]

This legal lens encourages one to look beyond the absence of a corporation in the docket at Nuremberg and examine the *content* of decisions handed down at the Nuremberg tribunals. It also encompasses the treatment of German corporations by the array of Allied authorities, both judicial and otherwise, exercising legal functions in the immediate post-War period.[107]

102. *Report of the International Law Commission on the Work of its Forty-Eigth Session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-First Session, Supplement No.10*, [1996] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/51/10 [hereinafter *Forty-Eighth Session Report*].

103. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

104. *Id.* at 95 (distinguishing that for joint criminal enterprises, individuals must have a nexus to the group to be criminally liable); CASSESE ET AL., *supra* note 10, at 137.

105. Brief for Kiobel-Omer Bartov et al. as Amici Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2011 U.S. S. Ct. Briefs LEXIS 1154 [hereinafter *Bartov Amicus Brief*].

106. Kiobel v. Royal Dutch Petrol. Corp., 621 F.3d 111, 179-80 (2d Cir. 2010).

107. BORKIN, *supra* note 96, at 160 (noting that the big three's stock, combined, represented over fifteen percent of the value of all stock on the West German stock exchange).

The legal lens highlights that the basis upon which several individual industrialists were found guilty of international crimes was due to their participation in the criminal conduct of corporations such as I.G. Farben.[108] Justice Leval observed when examining this very issue in the *Kiobel* ATS case that: "[i]n at least three of those trials, tribunals found that corporations violated the law of nations and imposed judgment on individual criminal defendants based on their complicity in the corporations' violations."[109]

The legal reasoning of the tribunals in the Industrialist Cases was a two-step process. For example, in the *I.G. Farben* Trial, the Tribunal concluded that Farben had violated international law and then imposed liability on individual Farben executives and employees based on their complicity in Farben's violations.[110] Thus, whilst none of the companies were formally declared "criminal organisations" at Nuremberg, nor were they subject to the jurisdiction of the IMT or zonal trials, the judgments in the Industrialist Trials suggest the possibility of attributing liability for war crimes and crimes against humanity to the companies themselves, not just their directors or employees.[111] For example, in *Krupp*, the Tribunal repeatedly referred to the collective intent of the Krupp Group, and noted the firm's "ardent desire" to employ slave labor in its factories.[112] Similarly, the *Farben* case implicated the conglomerate itself in the crimes perpetrated in its name.[113]

Several passages from the *Farben* trial judgment support this interpretation. The Tribunal determined that Farben, as a corporate entity, had directly violated the "Laws and Customs of War" of the Hague Regulations (1907) through its use of slave labor at Auschwitz and elsewhere, and found that it had been involved in war crimes and crimes

108. *See* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 106 (2002); Eric Mongelard, *Corporate Civil Liability for Violations of International Humanitarian Law*, 88 INT'L REV. RED CROSS 665, 676 (2006).

109. *Kiobel*, 621 F.3d at 180 (Leval, J. concurring).

110. *Id.* at 149.

111. *See* Ramasastry, *supra* note 108, at 112.

112. KRUPP CASE, *supra* note 49, at 1440.

113. I.G. FARBEN CASE, *supra* note 68, at 1132-33 (stating, during direct examination, that the "prosecution charges I.G. Farben . . . on its own initiative prepared mobilization plans, air-raid precautions, and air-defense measures.")

against humanity.[114] The Tribunal stated "[w]here private individuals, including *juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law."[115]

Describing Farben's activities, the judgment determination was clear:

> [W]e find that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries as above described . . . [t]he action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich.[116]

Establishing individual defendants' guilt through evidence of Farben's international law violations was a major legal argument accepted by the tribunal.[117] Proving the conglomerate's liability for grave violations of international law led to the convictions of the responsible individual directors and managers in the dock at Nuremberg.[118] As Engle observes, these German corporations were implicated in the crimes of their directors, and vice versa.[119] The judgment in the *Farben* case makes clear that:

> [w]hile the Farben organisation, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution

114. Regulations Respecting the Laws and Customs of War on Land, annex to Hague Convention No. IV Respecting the Laws and Customs of War on Land, The Hague, Oct. 18 1907, 36 Stat. 2310, *reprinted in* 2 AM. J. INT'L L. 90 (Supp.).

115. THE I.G. FARBEN CASE (1948), *reprinted in* 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1, 1132 (1952) [hereinafter I.G. FARBEN CASE VOL. 8].

116. *Id.* at 1140.

117. *See id.* at 1108 (finding that to hold defendants guilty "on the ground that they participated in the planning, preparation, and initiation of wars of aggression or invasions . . . requires a consideration of basic facts" including "their positions and activities with or in behalf of Farben.")

118. *Id.* at 1107.

119. Eric Engle, *Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?*, 20 ST. JOHN'S J.L. COMM. 287, 291-92 (2006).

> in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organisation as an instrument by and through which they committed the crime enumerated in the indictment.[120]

The Tribunal went on to condemn the crimes of Farben and its representatives, condemning not only the corporation's representatives, but the corporate entity itself.[121] Similarly, in the *Krupp* trial, the tribunal's judgment referred to actions by the company, not simply the actions of individual managers or employees when the tribunal concluded "that it has been clearly established by credible evidence that from 1942 onward illegal acts of spoliation and plunder were committed by, and on behalf of, the Krupp firm."[122]

C. "MEN" AND "ABSTRACT ENTITIES"

Adherents to this broader understanding of Nuremberg's treatment of corporate liability for international crimes suggest that the IMT's classic statement, that "crimes against international law are committed by men, not by abstract entities" is decontextualized and, as a result, entirely misconstrued by those adhering to the narrower, "judicial" interpretation.[123] Rather than an attempt by the IMT to constrain the scope of international criminal law to individuals, it was intended to have precisely the opposite effect.

Reflecting the traditional conception of international law, the Nazi defendants who were standing trial before the IMT argued that "international law is concerned with the action of sovereign States, and provides no punishment for individuals."[124] The IMT explicitly rejected the defendants' argument by affirming that "international law imposes duties and liabilities on individuals as well as upon States."[125] With this in

120. THE I.G. FARBEN CASE VOL. 8, *supra* note 115, at 1108.

121. *See id.* at 1140 (holding that the offenses were committed by both Farben and its representatives, and the actions "cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich").

122. KRUPP CASE, *supra* note 49, at 1370.

123. Brief for Kiobel-Navi Pillay as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter *Pillay Amicus Brief*].

124. United States v. Goering, Judgment, 52 (Int'l Mil. Trib. Oct. 1, 1946).

125. *Id.*

mind, the IMT's classic dictum that crimes against international law are committed by men, not by abstract entities takes on an entirely different meaning. The statement was intended as a rejection of this position of impunity put forward by the individual defendants.[126] The Tribunal was seeking to *extend* accountability under international law, not restrict it.[127]

As the U.N. High Commissioner for Human Rights, Navi Pillay, observed in an amicus curiae brief filed in the *Kiobel* ATS litigation, there is a parallel between the human defendants at Nuremberg, and the corporate defendants facing contemporary ATS suits for complicity in international crimes.[128] In each, the defendants argue that the judges should not hold them liable under international law, since at the time neither party's liability had attained the level of a "specific, universal and obligatory" customary international law norm.[129] In pleading for a repudiation, Pillay points out that, if one accepts this judicial reasoning, then one must conclude the Nuremberg trials themselves were based on an invalid expansion of international law.[130]

Rejecting such a perverse outcome, Justice Leval of the U.S. Second Circuit Court of Appeals sought to affirm corporate liability for international crimes in *Kiobel*.[131] In his separate (but concurring) opinion, he states that:

126. *See id.* (". . . that international law imposes duties and liabilities upon individuals as well as upon states has long been recognized.")

127. *Pillay Amicus Brief*, *supra* note 123, at 19-20 (contending that the point of the Nuremberg dictum "was to reject an argument of impunity by extending accountability to the human defendants who claimed, like the corporate defendants in *Kiobel*, that they could not be held accountable under international law," and not "to limit responsibility to natural persons alone").

128. *Id.* at 20 (contending that the impunity argument "advanced by the Second Circuit in *Kiobel* is remarkably similar to the argument that the IMT . . . rejected in the Nuremberg judgment.").

129. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (explaining the so-called "Sosa Test" as set forth in an earlier ATS case to determine what constitutes a "violations of the law of nations," as per the Statute's wording).

130. Former U.N. High Commissioner for Human Rights Navi Pillay stated in her amicus brief to the U.S. Supreme Court for the *Kiobel* case that:

> [G]eneral principles of law recognized by civilized nations are a source of international law that empowers the Court to . . . accept certain principles of law as governing their relations *inter se*, and to draw upon principles common to various systems . . . [to make] possible the expansion of international law.

Pillay Amicus Brief, *supra* note 123, at 235-26

131. Kiobel v. Royal Dutch Petrol. Corp., 621 F.3d 111, 151-52 (2d Cir. 2010).

> If past judges had followed the majority's reasoning [i.e., no recognition of corporate criminal liability under international law], we would have had no Nuremberg trials, which for the first time imposed criminal liability on natural persons complicit in war crimes; no subsequent international tribunals to impose criminal liability or violation of international law norms . . . .[132]

In an attack on the majority's decision in that case which centered around a denial of corporate liability for international crimes, Justice Leval incredulously suggested that if the majority's reasoning stands, it in effect creates an absurd new legal rule:

> The new rule offers to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy — all without civil liability to victims. By adopting the corporate form, such an enterprise could have hired itself out to operate Nazi extermination camps or the torture chambers of Argentina's dirty war, immune from civil liability to its victims. By protecting profits earned through abuse of fundamental human rights protected by international law, the rule my colleagues have created operates in opposition to the objective of international law to protect those rights.[133]

Thus, emphasizing these elements of the Nuremberg-era judgements, the Industrialist Trials held in the U.S. zone at Nuremberg evinces "the willingness of key legal actors to contemplate corporate responsibility at the international level."[134] Pillay argues that the legal treatment of these German companies supports "the proposition that corporations can and should be held accountable for violations of fundamental human rights norms."[135] Moreover, Engle views the trials' legacy similarly, observing that Nuremberg is recognised as the moment and place when the "principle where corporations are capable of committed crimes under international law is revealed."[136]

132. *Id.* at 153.
133. *Id.* at 153.
134. RATNER, *supra* note 11, at 447.
135. *Pillay Amicus Brief*, *supra* note 123, at 23.
136. Engle, *supra* note 119, at 291-92.

D. LOOKING FOR LAW BEYOND THE COURTROOM

Furthermore, the legal, as distinct from the judicial interpretation of Nuremberg's legacy vis-a-vis corporate liability for international crimes also seeks to view the IMT as but one component of the post-war legal order that oversaw Occupied Germany and punished the civil and military leadership of the Nazi regime, including leading German corporations. Beyond formal judicial penalty, the fate of the I.G. Farben conglomerate is illustrative of how German corporations were treated and punished by the victors of World War II.[137] The Allied Powers established a regime to govern Germany in the immediate post-war period.[138] The Allied Control Council, of which the United Kingdom, the United States, and Russia were founding members with France, which joined the Council later, became the sovereign of occupied Germany, succeeding the Nazi state from which it had just accepted unconditional surrender.[139] The international tribunals set up in Nuremberg to try Nazi leaders were established pursuant to *Allied Control Council Law No. 10* issued on 20 December 1945.[140] Weeks earlier, the Allied Control Council issued *Allied Control Council Law No. 9* of 30 November 1945 that seized the assets of I.G. Farben and dissolved it as a going concern for the express purpose of "ensur[ing] that Germany will never again threaten her neighbors or the peace of the world."[141]

137. *See* BORKIN, *supra* note 78, at 158.

138. Agreement Between the Allies on Control Machinery in Germany, U.K.-U.S.-U.S.S.R., Nov. 14, 1944.

139. HELLER, *supra* note 55, at 114 (demonstrating the legal basis upon which the Allied Control Council exercised its authority has been a matter of long-running disputes amongst legal scholars and historians). However, the argument that attracts the most support from scholars is that in the immediate aftermath of World War II, the unconditional surrender of Nazi Germany to the Allies was an instance of the *deballatio* of Germany – "a situation in which victorious powers are entitled to assume absolute sovereignty over a state because its government, as a result of total military defeat, has ceased to exist." *Id.*

140. ALLIED CONTROL COUNCIL NO. 9: PROVIDING FOR THE SEIZURE OF PROPERTY OWNED BY I.G. FARBENINDUSTRIE AND THE CONTROL THEREOF (1945), *reprinted in* 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 225 (1946).

141. LAW NO. 9: PROVIDING FOR THE SEIZURE OF PROPERTY OWNED BY I.G. FARBENINDUSTRIE AND THE CONTROL THEREOF (1945), *reprinted in* PROPERTY CONTROL: ANNEX XVIII 87 (1949).

Arguably, the law to dissolve Farben, seize its assets, and allow for reparations to victims from those assets is a decision of a legal, even penal, nature, and it forms part of Nuremberg-era jurisprudence. On this reading of history, therefore, the tribunal in Farben—the largest of the German conglomerates and the corporation perceived as the most complicit in the Nazi war machine—determined it was guilty of war crimes. Hence, Farben was punished by the same entity that created the IMT, and Farben received a penalty of the highest order for an entity unable to be incarcerated or executed: corporate capital punishment, or dissolution.[142] As several Nuremberg legal scholars have noted: "[d]eath through seizure was as much a pronouncement of international law as *Control Council Law No. 10* which was used to prosecute natural persons and organizations."[143] It was understood that corporations would be punished for their complicity in Nazi crimes, even as their individual directors and managers would also be held to account through legal prosecution at Nuremberg.[144] As Justice Rogers of the U.S. Court of Appeals for the District of Columbia observed in another ATS case against a transnational corporation, "the Allies determined that I.G. Farben had committed violations of the law of nations and therefore destroyed it."[145] Farben's punishment was but one example, reflective of the treatment meted out to other German corporate giants through subsequent Allied Control Council laws and proclamations. Furthermore, *Krupp* and *Flick* were also the subjects of seizure orders and reparations orders.[146]

142. BORKIN, *supra* note 78, at 158.

143. *Bartov Amicus Brief*, *supra* note 105, at 22.

144. *Id.* at 22.

145. Doe v. Exxon Mobil Corp., 654 F.3d 11, 52 (D.C. Cir. 2011).

146. *See* ALLIED CONTROL AUTHORITY CONTROL COUNCIL LAW NO. 57: DISSOLUTION AND LIQUIDATION OF INSURANCE COMPANIES CONNECTED WITH THE GERMAN LABOUR FRONT (1947), *reprinted in* 8 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 1 (1947); LAW NO. 27: REORGANISATION OF THE GERMAN COAL AND STEEL INDUSTRIES (1950), *reprinted in* OFFICIAL GAZETTE OF THE ALLIED HIGH COMMISSION FOR GERMANY (1950), http://www.cvce.eu/obj/law_no_27_on_the_reorganisation_of_the_german_coal_and_steel_industries_16_may_1950-en-6148d81c-88f9-4afd-9f95-d2b626b9ed0b.html; LAW NO. 52: BLOCKING AND CONTROL OF PROPERTY, *in* DENAZIFICATION: ANNEX H: MILITARY GOVERNMENT – GERMANY SUPREME COMMANDER'S AREA OF CONTROL 46 (1948); GENERAL ORDER NO. 3: PURSUANT TO MILITARY GOVERNMENT LAW NO. 52; BLOCKING AND CONTROL OF PROPERTY: BANK DER DEUTSCHEN ARBEIT A. G., *in* GERMANY MILITARY GOVERNMENT

Summing up the legal approach to viewing Nuremberg's treatment of German corporations, several international criminal law scholars note, "Nuremberg era jurisprudence establishes, therefore, that not only States and natural persons can be liable for international law violations, but also juridical entities."[147] The same group of scholars reflect on the narrower judicial interpretation of that history and state that "to use Nuremberg era jurisprudence as a basis to immunize corporations from liability under international law, we contend, would be contrary to the underlying goals of this jurisprudence."[148] Pillay appeals to notions of fairness and effectiveness within the international legal order when arguing that, "[a] corporation cannot be permitted to commit genocide, crimes against humanity, or war crimes, given that every other participant on the plane of international law is prohibited from doing so."[149]

This argument, predicated on morality and fairness, is reminiscent of a Rawlsian conception of justice and finds support in the IMT judgment itself.[150] In the main war-crimes trial, the defense put forward the argument of *nullum crimen sine lege*,[151] arguing that the tribunal was trying the Nazi defendants for actions that were not crimes when they were committed and this was ex post facto justice that could not stand.[152] Explicitly rejecting the positivist position on the state of international law, the IMT took a 'naturalistic approach' to this issue by stating that *nullum crimen* was a principle not of law, but of justice, and as such could be set

GAZETTE: UNITED STATES AREA OF CONTROL 32-33 (1949).

147. *Bartov Amicus Brief*, *supra* note 105, at *13.

148. *Id.* at *29.

149. Pillay Amicus Brief, *supra* note 123, at 16; *accord* ZERK, *supra* note 18, at 75-76; *see also* Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, in NON-STATE ACTORS AND HUMAN RIGHTS 141, 150 (Philip Alston ed., 2005); INT'L. COUNCIL ON HUM. RTS. POL'Y, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 12 (2002).

150. JOHN RAWLS, A THEORY OF JUSTICE 3 (rev. ed. 1999) (contending that justice and fairness are essential to the welfare of society and "institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.").

151. WERLE & JESSBERGER, *supra* note 11, at 39 (discussing that *nullum crimen sine lege* "requires that the criminal conduct be laid down as clearly as possible in the definition of the crime.").

152. WERLE & JESSBERGER, *supra* note 11, at 39-40 (noting that *nullum crimen sine lege* bars retroactive punishment, and the IMT examined "the criminal nature of crimes against peace at the time the acts were committed.").

aside if overridden by a higher-order principle of justice.[153] The IMT stated that in instances where the "attacker must know that he is doing wrong, and so, far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[154] This naturalist argument also serves as a basis for supporting recognition of direct corporate liability for international crimes.

E. A POSSIBLE THIRD LENS

Aside from the two lenses, so far elucidated to make sense of the divergent views expressed by modern day scholars and jurists on the question of corporate liability for international crimes, it is also feasible to adopt a third lens through which to view the Nuremberg-era's legacy on the issue: the 'socio-legal' lens. Widening the aperture through which to view Nuremberg's legacy yet further than either the judicial or legal lenses previously discussed, to take in a larger historical perspective, one must be more circumspect that German corporations found complicit in the crimes of the Nazi state were held accountable at all.[155]

Contrary to the judicial and legal lenses, employing a socio-legal perspective requires an examination of the "law in action" and not just the "law in the books." The socio-legal lens permits us to look beyond the Allied Powers legal decrees through the Nuremberg's trial judgments, to the actual social consequences of such legal and judicial action. A broader view of history calls into question whether genuine accountability for the German corporate giants found complicit in the crimes of the Nazi regime was accomplished at all, despite the scores of corporate executives being tried and found guilty of war-crimes and other crimes and despite the legal orders calling for the dissolution of the major German conglomerates and the seizure of their assets.[156] According to this third socio-legal lens, at ICL's seminal moment of Nuremberg, at the definitive moment of

153. Cryer, *supra* note 8, at 155.

154. United States v. Goering, Judgment, 49 (Int'l Mil. Trib. Oct. 1, 1946).

155. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 25 (1910) (asserting that utilizing "Anglo-American common law as the basis from which to make logical deductions, the law in the books will more and more become an impossible attempt to govern the living by the dead.").

156. United States v. Goering, Order to Postpone Proceedings Against Gustav Krupp Von Bohlen, 1 (IMT Nov. 15, 1945).

punishing corporations for their involvement in some of the most heinous atrocities in history, accountability was ultimately not achieved.

As noted earlier, the IMT never prosecuted any representatives of German industry.. Furthermore, whilst the combined legal decisions of the Allied Control Council and subsequent zonal trials punished the major German conglomerates and their executive leaderships, that punishment was, in real terms, minimal and short-lived.[157] For example, the dissolution of I.G. Farben or other German companies never really occurred.[158] In the three months after issuing *Control Council No. 9* (which supposedly dissolved Farben and seized its assets), Farben's stocks continued to be traded on the Munich Stock Exchange.[159] Indeed, they doubled in value.[160] Originally, the United States intended to split Farben into forty-seven smaller units.[161] This never happened.[162] By 1951, local German interests, and the evolving geo-political realities of the nascent Cold War, had succeeded in forcing the Allies to shelve that plan that would have considerably weakened Germany, which the Allies now could ill-afford.[163] Instead, Farben was divided into just three companies: Bayer, BASF, and Hoechst.[164] Profits in the 1950s of each of these three firms quickly exceeded the profits of their predecessor I.G. Farben.[165] Thirty years after Nuremberg, all three were ranked in the thirty largest multi-national corporations in the world, each "bigger than I.G. Farben at its zenith."[166]

Moreover, in 1951, not three years after their sentences were handed down, almost all of the industrialists that were found guilty at Nuremburg had been released from jail.[167] This was motivated by

157. WILLIAM MANCHESTER, THE ARMS OF KRUPP 681 (1968); BORKIN, *supra* note 78, at 162.
158. BORKING, *supra* note 78, at 159.
159. *Id.* at 158.
160. *Id.* at 158.
161. *Id.* at 159.
162. *Id.* at 159.
163. *Id.* at 159.
164. BORKING, *supra* note 78, at 161.
165. *Id.* at 162
166. *Id.* at 163.
167. MANCHESTER, *supra* note 157, at 687.

political expediency and the evolving geo-politics of the period.[168] Turning its attention from litigating the past war, the United States began to look ahead and was now focused on bolstering a German economy as a bulwark against the perceived rising "red threat" from the Soviet Union.[169] Several of the guilty men even resumed their leadership of German industry. Alfred Krupp resumed control of his steel firm in 1953, and Fritz Ter Meer (the only war criminal convicted of both plunder and slavery for his role in Farben's slave labor factories at Auschwitz) became chairman of the board of Bayer in 1956.[170]

V. BEYOND NUREMBERG: CORPORATIONS BEFORE CONTEMPORARY INTERNATIONAL CRIMINAL TRIBUNALS

Subsequent international criminal jurisprudence and writings fail to evince a clear dominance of any one of these lenses, and, rather, seemingly perpetuates the confusion as to corporate liability for international crimes. Notably, in line with the judicial-lens' understanding of Nuremberg's legacy, the constitutive documents of the two ad hoc international criminal tribunals, and the International Criminal Court expressly grant jurisdiction to try only natural persons, not legal persons, i.e., corporations.[171] Certainly, to date, none of these tribunals have prosecuted or criminalised a single corporate entity.[172] However, as adherents to the legal-lens approach

168. BOWER, *supra* note 67, at 364-66 (explaining that the imminence of the fight against communism led to the releases). Germans contended that helping the United States against communists would be easier if the Industrialists and convicted men in Landsberg prison were released.

169. *See* Bush, *supra* note 9, at 1121 ("[b]y mid-1946, when decisions about war crimes for big business were being reached, most planners had concluded that political and economic stability could only be achieved with the participation of German industry run by the same managers, regardless of culpability.").

170. BORKIN, *supra* note 78, at 162.

171. *See* G.A. Res. 827, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia 6 (May 25, 1993) (granting jurisdiction over natural persons); S.C. Res. 955, Statute of the International Tribunal for Rwanda, (Aug. 8, 1994) (granting jurisdiction over natural persons); Rome Statute, *supra* note 4, at 17 (granting jurisdiction over natural persons).

172. *See generally All Cases*, INT'L. CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx (last visited Oct. 25, 2015) (listing all ICC cases); *Status of Cases*, INT'L. CRIM.

argue, the constitutive documents of these tribunals do not, necessarily define the extent of substantive law. Rather, they are instruments that extend their respective tribunal's jurisdiction to certain subjects and/or geographic areas. The fact that corporations cannot be prosecuted at these tribunals is thus reduced to a procedural matter, rather than reflecting substantive legal principles.[173]

Moreover, there is confusion in the literature as to why the proposal to include jurisdiction over "legal persons" in the text of the International Criminal Court ("ICC") Rome Statute was ultimately left out. Some scholars cite substantive concerns with the proposal, while others suggest it was a matter of diplomatic expediency.[174]

TRIB. FOR RWANDA, http://41.220.139.198/Cases/tabid/204/Default.aspx (last visited Oct. 25, 2015) (listing the status of International Criminal Tribunal for Rwanda cases); *Judgement List*, INT'L. CRIM. TRIB. FOR FORMER YUGOSLAVIA, http://www.icty.org/sid/10095 (last visited Oct. 25, 2015) (listing all ICTY judgments).

173. Brief for Kiobel-Yale Law School as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2011 U.S. S. Ct. Briefs LEXIS 2746, *55 (arguing that corporations are not categorically incapable of violating international law, but procedurally individuals are held responsible).

174. *Rep. of the Preparatory Comm. on the Establishment of an Int'l. Crim. Ct.*, U.N. Doc. A/CONF.183/2/Add.1, 49 (July 17, 1998) [Report of the *Prep. Comm.*] ("[t]he Court shall also have jurisdiction over legal persons . . .
when the crimes committed were committed on behalf of such legal persons . . .
[t]he criminal responsibility of legal persons shall not exclude the criminal respons ibility of natural persons who are perpetrators or accomplices . . . .") [translated from French]; *see also*, Micaela Frulli, *Jurisdiction Ratione Personae*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 527, 532-33 (Antonio Cassese et al. eds., 2002) (contending legal persons were left out because of the lack of a common approach between nations, which could affect the principle of complementarity); MARKOS KARAVIAS, CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW 100 (2013) (contending time running out and substantive divergence of States regarding corporate criminal responsibility were major factors); Andrew Clapham, *The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States*, *in* FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 233, 243 (Ramesh Thakur & Peter Malcontent eds., 2004) (contending individual responsibility and the lack of consensus among states recognizing corporate criminal responsibility were major factors); Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L. FORUM 1, 7 (1999) (contending the "inclusion of collective liability would deflect from the Court's jurisdictional focus, which is on individuals," [as well as] problems of evidence and the lack of

Nevertheless, as Clapham observes, "although the proposal was eventually abandoned," by even countenancing the inclusion of "legal persons" (i.e., corporations) within the jurisdiction of the ICC, "one could conclude that international law can actually create directly enforceable duties for corporations."[175] Furthermore, the current absence does not preclude the inclusion of a provision allowing for corporate criminal responsibility at some future date.[176] Moreover, several countries, including Australia, Canada, and France, have incorporated the Rome Statute into their respective domestic laws without drawing a jurisdictional distinction between natural and legal persons, allowing for corporate criminal responsibility for heinous violations of international human rights and humanitarian law in their domestic courts.[177]

A. CORPORATE CRIME REMAINS ON THE AGENDA…SORT OF

Notwithstanding the jurisdictional impediments to trying corporations per se, corporate conduct has come under scrutiny in the modern-day international criminal tribunals. Following the precedent established by the Nuremberg prosecutions of German industrialists, two cases at the International Criminal Tribunal for Rwanda ("ICTR") successfully prosecuted corporate leaders for utilising the resources of their corporations and their positions of authority to commit war crimes and genocide, as well as allowing their employees to engage in such crimes.[178]

universally recognized common standards for corporate liability led to the rejection).

175. Andrew Clapham, *Globalization and the Rule of Law*, 61 REV. OF INT'L. COMM'N. OF JURISTS 17, 32 (1999); *See also* Mongelard, *supra* note 108, at 673 (stating there is nothing to indicate duties to make reparations could not be imposed on a legal person).

176. CRIMINAL LAW AND INTERNATIONAL CRIMES, *supra* note 25, at 56 (contending that the detraction of focus on individual criminal responsibility, problems of evidence, and lack of a recognized standard of corporate responsibility "should not preclude the States Parties to the ICC Statute from including a provision for corporate criminal responsibility in the future.").

177. *Id.* at 56; ANITA RAMASASTRY & ROBERT THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW: A SURVEY OF SIXTEEN COUNTRIES 16 (2006).

178. *See* Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgement, 2 (Int'l. Crim. Trib. for Rwanda Nov. 28, 2007) (finding Nahimana, Barayagwiza, and Ngeze guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and persecution and extermination as crimes

Similarly, corporate crime has been on the ICC's agenda. In 2003, the first Prosecutor of the ICC, Luis Moreno-Ocampo, publicly suggested that he was prepared to investigate and prosecute corporate executives for international crimes, or complicity thereof.[179] He referred to the trade in African blood-diamonds, and the situation in the Democratic Republic of Congo, noting that that those who direct operations in the extractives industries "may also be the authors of crimes, even if they are based in other countries."[180] Despite Ocampo's public statements, no formal investigations, let alone prosecutions, of corporate leaders have yet occurred.[181]

against humanity); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, 250 (Int'l. Crim. Trib. for Rwanda Jan. 27, 2000) (finding Musema incurred criminal responsibility as the superior for the acts committed by employees of the Gisovu Tea Factory during the attack); Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 81(Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (finding Tadic individually responsible for criminal violations); *see also* Simpson, *supra* note 24, at 76; *Forty-Eighth Session Report*, *supra* note 102, at 43 (discussing individual criminal responsibility); Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 177, 196 (Philip Alston ed., 2005) (discussing private actors' international responsibility when they violate international norms); KARAVIAS, *supra* note 174, at 91 (contending "the private nature of corporate conduct does not bar the possibility that the corporation may incur international criminal responsibility"); Simpson, *supra* note 24, at 76 (discussing the move to individual responsibility for international criminal acts); KIRSTEN J. FISHER, MORAL ACCOUNTABILITY AND INTERNATIONAL CRIMINAL LAW: HOLDING AGENTS OF ATROCITY ACCOUNTABLE TO THE WORLD 74 (2012).

179. *See* Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUM. RTS. BRIEF, no. 2, 2004, at 1; James Podgers, *Corporations in Line of Fire*, A.B.A. J. (Jan. 2, 2004, 8:23AM), http://www.abajournal.com/magazine/article/corporations_in_line_of_fire (suggesting that it is possible for corporations to facilitate conduct that leads to violations of international law, such as genocide and crimes against humanity, and, as a result, it is possible officials of the companies could be prosecuted).

180. *Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, Assembly of State Parties to the Rome Statue of the International Criminal Court* (Sept. 2003), https://www.icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/LMO_20030908_En.pdf.

181. *All Cases*, *supra* note 172.

VI. CONCLUSION: *LEX FERENDA*, NOT *LEX LATA*…YET

A thorough analysis of Nuremberg-era jurisprudence raises divergent understandings of what this seminal moment in the development of international law says about corporate accountability under that law. Whether one chooses the narrow judicial or the wider legal lens largely depends on one's own legal philosophy and one's own pre-conceived biases to the issue at hand.[182]

The doctrinal answer may be to conclude that at the present time corporations are not liable under international law for violations of human rights and humanitarian law, and, thus, the judicial lens is ascendant. Yet, an analysis of the literature supporting a legal-lens perspective on the Nuremberg-era's legacy on corporate liability under international law may leave the objective reader with the feeling that this is a more hopeful prescription than description; advocating what international law *should* be (*lex ferenda*), not what it *is* (*lex lata*).[183]

However, the orthodox viewpoint is persistently challenged by the inexorable humanization of international law.[184] As Justice Bargawanath of the Special Tribunal for Lebanon observed in 2014, there is an international trend towards recognizing the liability of corporations under international criminal law.[185] Confirming

182. Rufus E. Miles Jr., *The Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV 399 (1978) ("Miles' Law says: "[w]here you stand depends on where you sit."); RICHARD E. NEUSTADT & ERNEST R. MAY, THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS (1986).

183. *See, e.g.*, Joseph, *Taming the Leviathans*, *supra* note 15, at 186.

184. Theodor Meron, *The Humanization of International Law* (2006). *See also* HEIKILIA VERRIJIN STUART & MARLISE SIMMONS, THE PROSECTUOR AND THE JUDGE: BENJAMIN FERENCZ AND ANTONIO CASSESE: INTERVEWS AND WRITINGS (2009); Janne E. Nijman, *Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality*, *in* NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW 91, 98 (Math Noortmann & Cedric Ryngaert, eds., 2010); *Muchlinski*, *supra* note 19, at 30; Kristian Fauchald & Jo Stigen, *Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1042 (2009) (contending "the role of corporations in the commission of international crimes in conflict zones is widely recognized, and prosecuting corporations is increasingly recognized conceptually at a national level.").

185. Prosecutor v. Akhbar Beirut S.A.L, Case No. STL-14-06/I/CJ/, Decision in Contempt Proceedings, 11 (Special Trib. for Leb. Jan. 31, 2014) (discussing a

corporate liability for conflict-driving conduct—as a matter of positive law—will require the integration of corporations into the positive law of the International Criminal Court, or, alternatively, the recognition of corporate liability for international law violations in other jurisdictions such as domestic legal systems, a process already underway. Nevertheless, the importance of the socio-legal lens is that it serves as a reminder that the value of international law (and corporate liability thereof), is to a large extent dependent on the capability and requisite political will to enforce it.[186] The absence of effective, respected enforcement measures bedevils public international law.[187] The socio-legal lens demands that, aside from questions of the appropriateness or legal liability of corporations under international law reflected in the choice of the judicial or legal lens, the practical question of ensuring accountability in the real-world is salient and similarly problematic.

Going forward, if and when the U.S. Supreme Court, other countries' high courts, and international tribunals definitively weigh in on the question of corporate liability for international crimes—whether it is in the context of future ATS litigation or otherwise—they will doubtless pay heed to Nuremberg's legacy. In turn, their interpretation of this seminal moment in the development of international law, will go some way to determining the future effectiveness of the international legal order and its ability to respond to the ever-increasing social, economic and political power of the contemporary multi-national corporation.

What seems probable is whatever their formal status within the international legal system may be *today*, corporations will necessarily be sewn more firmly into the fabric of a globalised legal order in the decades to come.[188] Indeed, in that regard the words

recent survey of corporate liability in Europe identifying "a general trend in most countries toward bringing corporate entities to book for their criminal acts or the criminal acts of their officers.").

186. PORTMANN, *supra* note 3, at 225 (asserting international rules exist as an effect of actual State interests).

187. Mongelard, *supra* note 108, at 671 (discussing the difficulty in asserting companies' duty to make reparation for damages resulting from a breach of international obligations because no enforcement mechanism provides for liability of non-state entities).

188. *Backer*, *supra* note 15, at 389.

penned in 1946 by Lord Quincy Wright, legal advisor to the IMT at Nuremberg, provide a hopeful observation with which to conclude:

> International law is progressive . . . The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules deliberately and overtly recognized by the consensus of civilised mankind . . . I am convinced that international law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity.[189]

189. Lord Quincy Wright, *War Crimes Under International Law*, 62 L. Q. REV. 40, 51 (1946).